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No. 78-25

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

BERNADINE ROSE BROKENLEG,
Petitioner,
v.
BERNARD C. BUTTS, SR., *et ux.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Texas, El Paso

MOTION OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Academy of Child Psychiatry ("the Academy") hereby respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Consent to the Academy's filing of a brief was obtained from the attorney for the petitioner, but the requested consent of the attorney for respondents was refused.

The American Academy of Child Psychiatry is a national professional organization of over 2,100 child psychiatrists whose expertise and professional interests focus on the mental health of the nation's children. Through its Committee on the American Indian Child, the Academy has long been concerned with the plight of American Indian children who are removed from their biological parents and Indian communities. In 1974, representatives of the Academy testified before the Senate subcommittee on Indian affairs, to urge the enactment of legislation to end or substantially reduce the incidence of such removal. The Academy adopted a formal position paper on the placement of American Indian children in January 1975,[1] and in April 1977 sponsored a national conference on "Supportive Care, Custody, Placement and Adoption of American Indian Children," the proceedings of which have been published and circulated widely. In August 1977 a representative of the Academy testified, before the Senate Select Committee on Indian Affairs, in favor of the subsequently adopted Indian Child Welfare Act.

Statistics show that an astoundingly high percentage of American Indian children are removed by government authority from the custody of their biological parents. Surveys conducted in 1969 and 1974 by the Association on American Indian Affairs indicated that approximately 25 to 35 percent of all American Indian children have been so separated from their parents. *See* Comment, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 Colum. Human Rights L. Rev. 529 (1975). Figures compiled in 1976 for South Dakota, the home state of the petitioner in this case, reveal that in that state 22.4 times as many Indian children as non-Indian children were removed from their natural parent(s) and placed

[1] This position paper was submitted to the Senate subcommittee.

in foster care homes or institutions. *See* S. Rep. No. 597, 95th Cong., 1st Sess. 49 (1977). *See generally id.* at 11, 44, 46-50. These statistics also show that, when removed from their parents, Indian children are usually placed with non-Indians. *Id.*

The Academy believes that decisions to remove Indian children from their biological parents and Indian communities have often been made by agencies and courts improperly influenced by their own personal views of the social, cultural, and economic components of a "good home" and that placement decisions following removal have been carried out by agencies and courts unaware of the psychological, developmental, and cross-cultural problems involved in removing Indian children from their Indian community environment. The experience of Academy members and other clinical evidence suggest that Indian children placed in off-reservation non-Indian homes are at risk in their later development, even when they are cared for by devoted and well-intentioned foster or adoptive parents. These children typically have come to believe that something is wrong with their own parents and their Indian heritage. Particularly during adolescence, they often experience ethnic confusion and a pervasive sense of abandonment, with consequent detrimental effects on their own lives and on their capacities to become good parents.[2]

The case at bar dramatically illustrates the kinds of improper considerations on which removal and placement decisions with respect to Indian children have frequently been based.[3] The Academy's interest in the present case,

[2] These views of the Academy have received general endorsement from Congress. *See* S. Rep. No. 597, 95th Cong., 1st Sess. 12, 52 (1977); 124 Cong. Rec. H12,848-50 (daily ed. Oct. 14, 1978) (remarks of Reps. Udall and Lagomarsino).

[3] The trial court's decision even achieved quotation during Congressional debate as an example of the shocking grounds relied on to remove Indian children from their parents. *See* 124 Cong. Rec. H12,849 (daily ed. Oct. 14, 1978) (remarks of Rep. Udall).

however, transcends its special concern for the Indian parents and children affected by such decisions. The decision of the court below has grave implications for parents and children from other minority and disadvantaged groups, and indeed for parents and children generally insofar as it holds that parents may be deprived of custody of their children without any showing that the parents are or have been "unfit" parents in any sense of the term.

The Academy seeks leave to proceed as *amicus curiae* in order (1) to emphasize the importance, from the standpoint of the psychological well-being of the child, of maintaining custody with his or her natural parent absent a showing that the parent is no longer fit to have custody, and (2) to suggest the kinds of considerations which, from a psychological point of view, should be taken into account in determining whether the natural parent is fit to maintain custody.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	2
A. The Decision Below Conflicts with Decisions of this Court as to the Due Process Rights of Fit Parents to Custody of their Children	3
B. The Decision Below Denies Petitioner Equal Protection of the Laws	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

Breed v. *Jones*, 421 U.S. 519 (1975)	4
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977)	5
Craig v. *Boren*, 429 U.S. 190 (1976)	9
Goss v. *Lopez*, 419 U.S. 565 (1975)	4
In re Gault, 387 U.S. 1 (1967)	4
Korematsu v. *United States*, 323 U.S. 214 (1944)	9
Loving v. *Virginia*, 388 U.S. 1 (1967)	9
McDonald v. *Board of Election*, 394 U.S. 802 (1969)	9
May v. *Anderson*, 345 U.S. 528 (1953)	3
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	3
Moore v. *City of East Cleveland*, 431 U.S. 494 (1977)	8
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	3
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976)	4
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	3
Quilloin v. *Walcott*, 434 U.S. 246 (1978)	4
Roe v. *Conn*, 417 F. Supp. 769 (N.D. Ala. 1976)	10
Shelley v. *Kraemer*, 334 U.S. 1 (1948)	9
Skinner v. *Oklahoma*, 316 U.S. 535 (1942)	3

TABLE OF AUTHORITIES—Continued

	Page
Smith v. *Organization of Foster Families*, 431 U.S. 816 (1977)	5
Stanley v. *Illinois*, 405 U.S. 645 (1972)	4, 5
Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969)	4
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	4
Constitution:	
United States Constitution, Fourteenth Amendment	3, 7

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BRIEF AMICUS CURIAE FOR AMERICAN ACADEMY OF CHILD PSYCHIATRY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

As stated in its motion for leave to file this brief, *amicus curiae* American Academy of Child Psychiatry ("the Academy") is a national professional organization of over 2,100 child psychiatrists whose expertise and interests focus on the mental health of the nation's children.

Through its Committee on the American Indian Child, the Academy has long been concerned with the plight of American Indian children who are removed from their biological parents and Indian communities. The Academy has demonstrated this concern by testifying before Congressional committees, by sponsoring a national conference on the placement of American Indian children, and by publishing both the proceedings of this conference and a formal position paper.

The Academy believes that this case has grave implications for American Indian children, and for children and parents generally. As *amicus curiae*, the Academy seeks (1) to emphasize the importance, from the standpoint of the psychological well-being of the child, of maintaining custody with his or her natural parent absent a showing that the parent is no longer fit to have custody, and (2) to suggest the kinds of considerations which, from a psychological point of view, should be taken into account in determining whether the natural parent is fit to maintain custody.

REASONS FOR GRANTING THE WRIT

The decision of the Texas Court of Civil Appeals raises constitutional issues of great importance. Its holding conflicts directly with decisions of this Court regarding the due process rights of parents. The findings on which the trial court based its decision, moreover, and which the appellate court implicitly endorsed in upholding the decision to deprive petitioner of custody of her daughter, demonstrate that the decisions below were based on impermissible racial considerations. Because of these violations of constitutional rights and the beneficial impact that clarification of these rights would have on child placement decisions generally, the Academy urges the Court to grant the writ of certiorari.

A. The Decision Below Conflicts with Decisions of this Court as to the Due Process Rights of Fit Parents to Custody of their Children

This Court has long recognized that the liberty guaranteed by the Fourteenth Amendment embraces the right "to marry, establish a home and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). *See also Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925) (liberty of parents to direct upbringing of children); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) (right to marry and procreate). In 1944, the Court summarized as follows its previous decisions with respect to the rights of parents and their families:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

Among the constitutionally protected interests within the "private realm of family life" which this Court has explicitly recognized are parents' rights to the "care, custody, management and companionship" of their own children, rights which the Court has characterized as "far more precious . . . than property rights." *May* v. *Anderson*, 345 U.S. 528, 533-34 (1953).

Of course, parents' rights to the "care, custody, management and companionship" of their children are not absolute. Parents have certain duties correlative to their rights, and a state may intervene in a parent-child relationship upon a showing of a countervailing state interest appropriate to the degree of intervention sought. *See, e.g., Meyer* v. *Nebraska, supra*, 262 U.S. at 400; *Prince* v. *Massachusetts, supra*, 321 U.S. at 166; *Wis-*

consin v. *Yoder*, 406 U.S. 205, 233-34 (1972); *Quilloin* v. *Walcott*, 434 U.S. 246, 248 (1978).

This Court has explicitly recognized, however, that a state's interest in interfering with a parent's right to the custody of his or her own child is "*de minimis*" if the parent is shown to be "fit." *Stanley* v. *Illinois*, 405 U.S. 645, 657-58 (1972). Indeed, in *Stanley* the Court flatly held that a state may not deprive a natural parent of the right to custody of his or her child unless it has been determined, after an appropriate hearing, that the parent is unfit to be the child's custodian. *Id.* at 649, 658. As the Court later put it in *Quilloin* v. *Walcott*, *supra*, 434 U.S. at 247-48:

> "In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent."

In *Quilloin* the Court also adopted, in a unanimous opinion, the earlier observation of Justice Stewart:

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment.)" *Id.* at 255.[1]

[1] The cases cited above all emphasize the rights of parents. As this Court has increasingly recognized in a variety of contexts, children also have certain rights. *Cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights"). *See generally In re* Gault, 387 U.S. 1 (1967); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975); Breed v. Jones, 421 U.S. 519 (1975). The nature and extent of the rights of children in family matters is very unclear, however. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 692 (1977) (opinion of Brennan, J.) (there is greater scope for state's exercise of authority over minors); Smith v. Organization of Foster Families, 431 U.S. 816, 840-41 (1977) (children have no due process rights with respect to foster relationships). This case provides the Court with an opportunity to clarify the rights, if any, of children involved in custody proceedings.

This Court has never been called upon to define the kinds of factors which a state may, consistent with the requirements of due process, take into account in determining whether natural parents are "unfit" to maintain custody of their children. Of course, recognition has traditionally been given to abuse, abandonment, and neglect as criteria of unfitness and therefore as grounds for depriving parents of their children's custody. *See, e.g.*, *Stanley* v. *Illinois*, *supra*, 405 U.S. at 652. The Academy respectfully submits, however, that there are also other factors which a state should take into account in determining a parent's fitness to maintain custody and that consideration of such factors is not precluded by due process considerations.

In the present case, for example, the Texas courts should have explored, with the assistance of thorough psychiatric examinations of both petitioner and her daughter, questions such as:

(1) the extent to which petitioner presently can satisfy her daughter's psychological needs or once had a positive psychological bond with her child which could be reestablished;

(2) the extent to which petitioner's daughter is likely to suffer adverse long-range psychological effects if she is cut off from her natural mother and her Indian heritage;

(3) the extent to which petitioner has the capacity to meet her daughter's social and cultural needs,

especially in light of her daughter's heritage; and

(4) the extent to which petitioner's daughter has formed a positive psychological bond with her grandparents and whether disruption of grandparental custody is likely to cause her severe long-range psychological harm.

It is clear from the record in this case, however, that the courts below applied neither the traditionally recognized standards of abuse, neglect, and abandonment to determine whether petitioner is unfit to have custody of her child nor any of the special considerations which the Academy believes should also have been taken into account in this case. On the contrary, the trial court took the position that petitioner's fitness as a mother was not even in issue (Appendix C, p. 18a[2]), and the Court of Civil Appeals set aside as unsupported by the record the only findings of the trial court which even suggested abandonment or neglect (Appendix C, pp. 15a-16a).[3] Nor did the courts below find that petitioner's daughter had established a psychological bond with her grandparents, much less that the importance of preserving any such bond outweighed other factors, such as the psychological harm that she might suffer by being cut off from her natural mother and her Indian heritage.

In short, the courts below denied petitioner custody of her child without any finding that she was unfit under *any* standard of fitness. Indeed, the Court of Civil Appeals flatly stated that:

[2] References to Appendix C are to the Judgment and Opinion of the Texas Court of Civil Appeals, as printed in Appendix C to the Petition For a Writ of Certiorari.

[3] Although the Court of Appeals also reversed the termination of petitioner's parental rights on the ground that the evidence provided no basis for such termination, it affirmed the grant of custody to the grandparents.

". . . a parent-child relationship may be terminated even though there is no proof or finding of unfitness on the part of the parent to remain as a parent." Appendix C, p. 16a.

The decision below is thus directly at odds with this Court's holding in *Stanley*.[4] The Court of Appeals compounded its error, moreover, by ignoring petitioner's request to set aside the findings on which the trial court based its award of custody to the grandparents. As we point out in part B below, those findings clearly reveal that the trial court's decision was based on impermissible racial considerations, in violation of the equal protection clause of the Fourteenth Amendment. In view of the fact that the appellate court declined to set these findings aside, it must be deemed to have adopted them as a basis for its conclusion that the grandparents had a more stable home and were better able than petitioner "to provide for the physical, mental and spiritual needs" of her daughter. (Appendix C, p. 18a.)[5]

What emerges from the record of this case is a clear picture of courts deciding the placement of a child on the basis of the judges' own values, norms, and biases instead of on the legal principles enunciated by this

[4] The reversal of the trial court's termination of parental rights obviously does not cure the conflict with *Stanley*, since the appellate court affirmed the grant of custody to the grandparents and thus deprived petitioner of one of her most important parental rights without a finding of unfitness.

[5] With respect to the "spiritual needs" of petitioner's daughter, it is worth noting that the hearing transcript shows a preoccupation, both by the trial court and by counsel for the grandparents, with the fact that the grandparents would give her a "Christian" rather than an Indian religious education. (*See, e.g.*, Statement of Facts (Transcript of Hearing Before Trial Court), pp. 12, 46, 60, 135.)

With respect to the "mental needs" of petitioner's daughter, the only evidence was the testimony of a psychiatrist that those needs would be served best by the reunion of petitioner and her daughter. (Statement of Facts (Transcript of Hearing Before Trial Court), pp. 102-05.)

Court. The decision below obviously has far-reaching implications and, if allowed to stand, would pose a serious threat to the privacy and integrity of many families. Certainly all Texas parents belonging to socio-economic, cultural, ethnic, or ideological minorities would stand in jeopardy of one day losing custody of their children. For if, as the court below held, parents may be deprived of custody of their children without any showing that they are in any way unfit, there would be nothing to prevent courts from concluding that children of such parents, or indeed of *any* parents, should be placed in the custody of others who are found, on the basis of the judges' own socio-economic and religious beliefs and values, to be better able to provide for the material and spiritual needs of the children.[6]

B. The Decision Below Denies Petitioner Equal Protection of the Laws

The trial court based its decision on eight findings of fact, some of which were set aside by the Court of Appeals. Of the findings which the appellate court failed to set aside, the following were obviously critical to the trial court's decision to deny petitioner custody of her daughter:

> ". . . [T]o return the child to Respondent's custody to be reared on an Indian Reservation would be detrimental and endanger the physical and emotional well-being of said child."
>
> "The child has physical features, as observed by the Trial Court, of a non-Indian nature and her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional wellbeing." Appendix D, p. 23a.[7]

[6] Particularly at risk would be parents who, out of genuine concern and love for their children, conclude that it would be best for their children to live temporarily with relatives or friends. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (Powell, J.).

By failing to set these findings aside in affirming the trial court's custody decision, the Court of Appeals implicitly endorsed them as the central basis for its determination. As a result, its decision, like that of the trial court, is based heavily on petitioner's race, the racial environment of the Indian reservation where petitioner lives, and the racial characteristics of her daughter.

The decision below is thus plainly repugnant to principles long established by this Court, which has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)." *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). In *Korematsu* v. *United States*, 323 U.S. 214 (1944), for example, the Court pointed out that classifications based on race are "immediately suspect" under the equal protection clause, that "courts must subject them to the most rigid scrutiny," and that they can be justified only by "[p]ressing public necessity." *Id.* at 216. *See also, e.g.*, *Loving* v. *Virginia*, *supra*, 388 U.S. at 10; *McDonald* v. *Board of Election*, 394 U.S. 802, 807 (1969); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The law is thus clear that any governmental determination based on a person's Indian race is inherently suspect and can be justified only by a demonstration that such a determination is necessary to the promotion of a compelling state interest. *See Craig* v. *Boren*, 429 U.S. 190, 208 n.22 (1976).

[7] References to Appendix D are to the Findings Of Fact And Conclusions Of Law of the trial court, as printed in Appendix D to the Petition for a Writ of Certiorari.

The courts below identified no such compelling state interest which might justify the racial basis for their decisions and none is even remotely suggested in the record. There certainly was no evidence in the record to support the findings that, if petitioner's daughter were reared by her mother on an Indian reservation, her physical and emotional well-being would be endangered. On the contrary, as noted in part A, the courts below completely failed to explore the likely psychological effects on petitioner's daughter of placement in her mother's custody, just as they failed to explore the likely psychological effects of cutting her off from her mother and her Indian heritage. The courts did explore the asserted lack of certain physical amenities on the Indian reservation (Appendix C, p. 13a), but that consideration obviously is insufficient to support the quoted findings.

Nor is there any evidence in the record that would support the more specific conclusion that petitioner's daughter would suffer emotional harm if raised in a primarily Indian community because she had "physical features . . . of a non-Indian nature." That finding rests solely on judicial notice of the child's features plus an unsupported and unwarranted assumption about the effects of growing up in a racially mixed community. As one court has correctly pointed out, the racial differences between a child and the community in which he or she is raised "can never amount to sufficient harm to justify a constitutional termination" of parental custody. *Roe* v. *Conn*, 417 F. Supp. 769, 781 (N.D. Ala. 1976).

The racial distinctions drawn by the courts below cannot be shown to serve any rational purpose whatsoever, much less a compelling state interest of the kind necessary to justify such distinctions. To deny a fit mother custody of her daughter because of her race, the racial composition of the community in which she lives, and the racial features of her daughter is to deny both her

and her daughter the equal protection of the laws in flagrant disregard of the principles established by this Court.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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